IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16233 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRADIP @ DILIP HARISHCHANDRA SHIVHARE

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 16233 of 2004

MR HR PRAJAPATI for Petitioner No. 1

MR MR PRAJAPATI for Petitioner No. 1

MS HANSA B PUNANI AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 02/03/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226

of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the order passed against him by Police Commissioner, Surat City, on 21st of October, 2003, in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is under detention as bootlegger from 6th of October, 2004 in pursuance of the above order.

2. The grounds of detention as placed on record reveal that the detaining authority took into consideration two types of materials to arrive at the subjective satisfaction. Firstly, the detaining authority considered a solitary crime registered against the petitioner under the Bombay Prohibition Act, before Udhana Police Station, on 16th of August, 2003, whereby it was alleged that the petitioner was found in possession of 2875 bottles of prohibited foreign liquor. The detaining authority examined thoroughly the investigation papers of the said crime registered against the petitioner and concluded that the petitioner was engaged in the activities of storing, selling and transporting prohibited liquor and was a bootlegger within the meaning of the PASA Act.

3. Secondly, the detaining authority took into consideration two in-camera statements of witnesses, as recorded by the sponsoring authority on 28th of September, 2003 and 29th of September, 2003 as verified by the detaining authority on 17th of October, 2003. The identity of the witnesses is not disclosed by the detaining authority, claiming privilege under Section 9(2) of the PASA Act. The first witness referred to an incident occurred on 30th of July, 2003. The witness was sitting in his office in Limbayat area, at about 05.00 p.m., the petitioner and his accomplices approached the witness in one tempo, and after parking said tempo on road, the witness was beckoned by the petitioner. The petitioner insisted that the bulk of prohibited foreign liquor, which was loaded in the said tempo vehicle, was to be kept by the witness at his office, for some days. The witness knew the activities of the petitioner and therefore he refused to keep the said prohibited liquor at his office. On refusal of witness, the witness was accosted and he was beaten by the petitioner and his accomplices. On raising shouts for help, the crowd was gathered near the place of incident and some of them attempted to rescue the witness, but the petitioner and his accomplices with weapons rushed towards the crowd to beat them, so people started running helter - skelter,

which resulted in disruption to the normal life. The petitioner and his accomplices rushed to the business place of the shopkeepers and created atmosphere of terror and fear, so the shops were closed and the residents of the locality locked themselves in their houses. By act of supplication, witness could save his skin.

4. The second witness referred to an incident occurred on 3rd August, 2003. The witness was standing in Pandeswara area along with his goods carriage vehicle, at about 4.00 p.m., the petitioner and his accomplices approached the witness and directed him to unload some bulk of foreign prohibited liquor loaded in their tempo and to load the same in the goods carriage of the witness and to place the same at various places. The petitioner stated that the hire charges will be paid by them. The witness knew the illegal activities of the petitioner and, therefore, he refused to obey the direction of the petitioner. On such refusal, the petitioner was accosted and started abusing and beating the witness. On raising shouts of help by the witness, a crowd was gathered and some of them attempted to rescue the witness, but the petitioner and his accomplices rushed towards the crowd with open knives, so people started running helter-skelter and normal life of the locality was disrupted. The petitioner and his accomplices created terror among the locality, so the business in the locality closed and on account of fear and insecurity, the residents of the locality locked themselves in their houses. Ultimately, by act of supplication, the witness could save himself.

5. Relying upon the above materials, the detaining authority came to the conclusion that the activities of the petitioner were disturbing the public order and the petitioner was in habit of harassing innocent citizens for ignoring his illegal activities. In view of the detaining authority, the petitioner was bootlegger within the meaning of the PASA Act. The detaining authority concluded that concluded that the activities of the petitioner were prejudicial to the maintenance of public order and were required to be prevented forthwith. The detaining authority therefore after considering the other remedies available against the petitioner under the general law, the detaining authority reached to the subjective satisfaction that there was no other alternative except to detain the petitioner under the PASA Act and, therefore, as aforesaid, the detaining authority passed the order of detention of the petitioner, which is under challenge in this petition.

6. Learned Advocate Mr. M.R. Prajapati for the petitioner and learned AGP Ms.Hansa B Punani for the respondents were heard at length. The affidavit-in-reply as filed by the detaining authority and placed on record is also taken into consideration.

7. Out of various grounds urged on behalf of the petitioner and opposed and controverted by learned AGP, it appears that this petition can be examined and disposed of only on the issue that whether there was credible and cogent material placed before the detaining authority to come to the conclusion that by the activities of the petitioner, the public order was disturbed and public health was adversely affected.

8. To reach to the subjective satisfaction that the bootlegging activities of the petitioner were prejudicial to the maintenance of public order and public health, the detaining authority must rely upon credible and cogent material indicating that the activities of the detenu directly or indirectly were causing or were likely to cause harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or the public health. While undertaking this exercise, the detaining authority has to draw a clear line between the cases falling within the category of breach of law and order and the cases falling within the category of breach of public order.

9. Referring to the solitary case filed against the petitioner under the Bombay Prohibition Act for the possession of prohibited liquor and going through the investigation papers as placed on record, it is found that this case came to be filed against the detenu because he was dealing in prohibited liquor. The possession of prohibited liquor is a breach under the Bombay Prohibition Act and hence the case came to be filed. However, merely filing case under the Bombay Prohibition Act would not result in a conclusion that the activities of the petitioner were disturbing the public order or was affecting adversely to the public health. At the most, the petitioner might have committed breach of the provisions of law, for which the petitioner may be tried and punished if found guilty, but surely the act constituting the offence in dealing in prohibited liquor cannot be said to have affected the even tempo of the life of the community nor the activities revealed through the investigating papers indicate that in the activities alleged through this case, society at large or section of the society or community or particular community was

involved. Therefore, this case may be an instance of breach of law and order, but cannot be branded as activities disturbing the public order or affecting the public health.

10. Further while referring to the in-camera statements, as recorded by the sponsoring authority and verified by the detaining authority, it must be borne in mind that while reaching to the subjective satisfaction about the alleged activities of the petitioner, it would be necessary for the detaining authority to consider fall out, reach and impact of the activities of the petitioner and thereafter to come to the conclusion that such activities were capable of disturbing the public order. Two incidents, as narrated through in-camera statements, reveal individual disputes than to involve society at large or even disturbing the even tempo of the life of the community. The potentiality of the act alleged through in-camera statements, even from the bare reading of them, are not capable of disturbing the even tempo of life of the community or society at large or section of the society. No widespread danger or harm to the society could be inferred from the statements of the witnesses. Therefore, even after taking them on their face value, those incidents, may be instances of disturbing law and order, which can be taken care of by general law and by no stretch of reasoning, such activities can be branded to be disturbing the public order or affecting adversely to the public health.

11. In the matter of ASHOKBHAI JIVRAJ @ JIVABHAI SOLANKI vs. POLICE COMMISSIONER, SURAT and Ors. as reported in 2000 (1) GLH 393. The Division Bench of this Court after considering many decisions of the Apex Court, observed in paras 20 and 21 as under :

> "20 The Division Bench then considered the law laid down by the Apex Court in Piyush Kantilal v. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 and Two. Devaki vs. State of Tamil Nadu, AIR 1990 SC 1086. In Piyush Kantilal, similar circumstances were before the detaining authority and it was alleged that detention of the detenu was necessary in order to prevent activities of the detenu in maintenance of public order. Similarly in Two. Devaki, panic amongst people in the hall in which the incident took place and in nearby vicinity was highlighted. It was also alleged that people were scared and had run helter-skelter. In spite of such allegations, the Supreme Court held that

they were not cases of maintenance of public order and hence, no action of preventive detention was uncalled for.

21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention, could not be used for maintenance of law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again in Mustakmiya Jabbarmiya Shaikh vs. M.M. Mehta, Commissioner of Police and Others, 1995 (2) GLR 1268 (Sc), the Supreme Court considered the relevant decisions on point including the decisions in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases."

12. The present set of facts are squarely covered by the above decision of this Court in the case of Ashokbhai Jivraj @ Jivabhai Solanki (supra) and therefore the subjective satisfaction arrived at by the detaining authority in respect of disturbance of public order by the alleged activities of the petitioner cannot be said to be legal, valid and in accordance with law. The order under challenge, therefore, is required to be quashed and set aside on this ground alone.

13. In the result, the petition is allowed. The order passed by the Commissioner of Police, Surat City, on 21.10.2003, against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu - Pradip alias Dilip Harishchandra Shivhare is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule made absolute. DS permitted.

(J.R. Vora, J.)